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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1257

LARRY DEAN PEARSON,
Petitioner,

v.

STATE OF NORTH CAROLINA.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

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LARRY DEAN PEARSON,
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STATE OF NORTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

The Petitioner, Larry Dean Pearson, prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeals for the State of North Carolina, said judgment entered September 22, 1975. (A-1) A Writ of Certiorari was applied for to the North Carolina Supreme Court from the said judgment of the Court of Appeals of the State of North Carolina and said Writ of Certiorari was denied on the 2nd day of December, 1975. (A-2)

JURISDICTION

The date of the denial of certiorari of the North Carolina Supreme Court was December 2, 1975 (A-2).

That the jurisdiction of the Supreme Court of the United States is invoked in this case by Title 28 of the United States Code Section 1257 (3) in that this writ has been submitted in apt time by being submitted within 90 days from the date of the judgment of the highest state court of the State of North Carolina denying the Defendant's Writ of Certiorari from the opinion of the N. C. Court of Appeals.

CONSTITUTIONAL PROVISIONS

The above-entitled case involves the denial of the Defendant's right to due process of law in that there was a fatal variance

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between the indictment and the evidence and a non-suit should have been granted at the end of the State's evidence. This was a denial of due process under the Fourteenth Amendment of the Constitution of the United States, Paragraph 1. Further, the Defendant was denied due process of law under the Fourteenth Amendment in that the North Carolina Court of Appeals refused to review the questions presented on appeal which were of vital interest to the law of the State of North Carolina because the trial attorney did not docket his appeal within the time alloted for docketing appeals in the North Carolina Court of Appeals. Therefore, the Petitioner was denied his due process of law under the Fourteenth Amendment of the Constitution of the United States, Paragraph 1, in that none of the errors commited in

the course of the trial were considered by any of the Appeals Courts of the State of North Carolina.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Trial Court commit error in denying the Defendant's motion for a directed verdict of not guilty for reason of a fatal variance?

2. Did the Trial Court commit error in denying the Defendan'ts motion for a new trial for errors commited during the trial?

3. Did the Trial Court commit error in his charge to the jury regarding the procurement of Bittle would be a procurement of Czech by the Defendant as a matter of law?

4. Did the Trial Court commit error in charging the jury that it is not necessary that the Defendant should have known that Czech was listening or that Czech was the person involved?

STATEMENT OF THE CASE

This was a criminal action in which the Defendant was tried upon the indictment charging that he "unlawfully and wilfully did feloniously and wantonly aid, counsel or procure Richard Joseph Czech to set fire and burn an uninhabited house, located at 25 Carolina Beach Avenue, North, Carolina Beach, North Carolina, and in the possession of Larry Dean Pearson". This criminal action was instituted in the Superior Court of the General Court of Justice of New Hanover County, Wilmington, North Carolina, and upon the Defendant's plea of not guilty, evidence was produced by the State to show that the Defendant owned said apartment and that he hired Gene Biddle to burn the house and that Biddle hired Richard Czech to burn said house, and in fact Richard Czech burned the

house. There was no evidence of any communication of the Defendant with Richard Czech in regard to the burning of the house, except that Richard Czech over-heard a conversation between Biddle and the Defendant without the Defendant's knowledge. The Defendant denied hearing Biddle and put on evidence that Biddle was trying to blackmail him.

The Trial Court over-ruled the Defendant's motion for a directed verdict of not guilty for fatal variance and also charged the jury that the Defendant did not have to know Czech was listening on the phone and that if they found the Defendant procured Biddle, then the Defendant would be guilty of procuring Czech as a matter of law.

The jury found the Defendant guilty and the Defendant gave notice of appeal to the North Carolina Court of Appeals in open court. The

Defendant did not perfect his appeal in that his statement of case on appeal was served fifteen days late on the District Attorney prosecuting the case; therefore, the North Carolina Court of Appeals elected not to review any of the questions presented on the Defendant's appeal.

ARGUMENT OF COUNSEL AS TO THE FACTS AND LAW OF THE QUESTION

BRIEF

The Petitioner bases his assignment of error and exception on Question 1. on the fact that the indictment alleged he procured Richard Joseph Czech to burn the house, but all of the State's evidence construed in the light most favorable to the State indicating that he procured Gene Biddle to do the act.

The Supreme Court of North Carolina and the North Carolina Court of Appeals have on many occasions set forth the requirments of the allegations and proof to avoid a fatal

variance and the reasons therefor. In State v. McDowell, 1 N.C. App. 361, 161 S.E. 2d 769 (1968), the Court said:

> "The State must charge the offense it intends to prove; it is upon the offense charged that a Defendant must predicate his plea of former jeopardy. It is a settled rule that the evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the defense. This rule is based upon the requirments that the accused shall be definitely informed as to the charges against him, and that he may be protected against another prosecution for the same offense." (P. 365)

The above case involved allegations of breaking or entering of a storehouse, but the evidence showed the entering of a dwelling house. There are many other cases which hold to the same principal as the one cited above.

CONCLUSION

In consideration of the general principles the Courts have held in regard to allegations and proof, it seems clear to the Petitioner that

precident was set for the allegations and proof in this case. First, there is no way the Petitioner was protected against an indictment of procuring Gene Biddle to burn the house upon the finding of not guilty upon this indictment. Second, there was no way the Petitioner or his counsel could prepare a defense, never having had any contact with the person named in the indictment as to the burning of the building.

ARGUMENT

The Petitioner abandons the other three arguments set forth in the front of this Petition and goes to the further argument that the Petitioner was denied due process of law under the Fourteenth Amendment, Paragraph 1 of the Constitution of the United States in that the North Carolina Court of Appeals denied to hear the above issue, which your Petitioner alleges is very important

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United States in general on the mere fact that his attorney was fifteen days late on serving his statement of case on appeal upon the District Attorney. Your Petitioner argues that in a case as serious as procurement of arson the Court of Appeals should certainly examine an important question of law and not ignore it merely because the counsel for the Defendant was fifteen days late on serving his statement of case on appeal on the District Attorney. This would seem Attorney General. This would seem to be completely unfair and work great injustice against a Defendant who had no control or knowledge on the working of his counsel in the appeal process. If this type of opinion was upheld, it would work great injustice and detriment to criminal defendants merely because of oversite or negligence of

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counsel.

The Court Reporter by enclosed affidavit (A-3), stated that he was unable to provide defense counsel with a transcript of the trial until the original time of filing this record on appeal had expired.

Also by affidavit (A-4) the District Attorney verbally agreed to extend the time to file the record on appeal.

CONCLUSION

It is the argument of Petitioner that there is definitely a fatal variance between the indictment and proof in the case and if the Court of Appeals of North Carolina should have elected to consider the case, there was a very good possibility that a reversal would have been ordered. Therefore, there would seem a substantial denial of the Petitioner's

right of due process of law merely by negligence or inadvertance of counsel on filing a statement of case on appeal.

Considering (A-4, 5), it would seem a travisty of justice for the errors committed during the course of the trial of the Petitioner not to be reviewed, especially since the Attorney General for North Carolina did not bring up this question in their brief but the North Carolina Court of Appeals ruled on their own motion.

George H. Sperry
Attorney for Petitioner
110 North Fifth Avenue
Wilmington, N.C. 28401

OPPOSING COUNSEL:

Donald A. Davis
Assistant Attorney General
P. O. Box 629
Raleigh, N.C. 27602

CERTIFICATE OF SERVICE

This is to certify that I have this 2nd day of March, 1976, served three copies of the Petition for Writ of Certiorari in the Supreme Court of the United States upon Mr. Donald A. Davis, Assistant Attorney General, Attorney for the State of North Carolina, Department of Justice, P. O. Box 629, Raleigh, North Carolina, in the case of State of North Carolina vs. Larry Dean Pearson, 755 SC 360, by depositing three (3) copies in the U. S. Mails with first class postage prepaid.

George H. Sperry

NO. 755SC360

NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 1975

STATE OF NORTH CAROLINA

v

New Hanover County
No. 74CR13778

LARRY DEAN PEARSON

Appeal by defendant from Fountain, Judge. Judgment entered 23 January 1975 in Superior Court, New Hanover County. Heard in the Court of Appeals 2 September 1975.

Defendant was charged with the felony of being an accessory before the fact of a felonious burning of an uninhabited building in possession of defendant. The indictment alleges that defendant unlawfully and willfully did feloniously and wantonly aid, counsel or procure Richard Joseph Czech to set fire to and burn an uninhabited house located at 25 Carolina Beach Avenue, Carolina Beach, North Carolina, on or about 2 August 1974.

From a verdict of guilty and judgment of imprisonment, defendant gave notice of appeal.

Attorney General Edmisten, by Assistant Attorney General Donald A. Davis, for the State.

John J. Burney, Jr., for the defendant.

BROCK, Chief Judge, PARKER and ARNOLD, Judges.

The judgment appealed from was entered on 23 January 1975. Under the rules applicable to this appeal, the record on appeal was required to be docketed on or before ninety days after entry of the judgment appealed from, unless the time for docketing was extended by proper order of the trial judge. The initial ninety days expired on 23 April 1975. On 7 May 1975, after expiration of the initial ninety days, defendant sought to resurrect his right to appeal by obtaining from the trial judge an extension of time to docket the record on appeal. The order entered after expiration of the initial ninety days was ineffective to extend the time within which to docket the record on appeal.

Appeal dismissed.

No. 88PC FIFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1975

STATE OF NORTH CAROLINA	)	ORDER DENYING
	)	PETITION FOR
	)	WRIT OF CERTIORARI
v	)	
	)	
	)	
LARRY DEAN PEARSON	)	(755SC360)

This cause came on to be considered upon the petition of the defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals; upon consideration whereof, it is adjudged by the Court here, that the petition be denied and that it be so certified to the said North Carolina Court of Appeals to the intent its decision be affirmed;

Witness my hand and the seal of the Supreme Court, this 2nd day of December, 1975.

Adrian J. Newton
Clerk of the Superior Court of
North Carolina

(SEAL) By:

s/John R. Morgan
Assistant Clerk

THROUGH

cc: Burney, Burney, Sperry & Barefoot,
Attorneys at Law
Alan S. Hirsch, Associate Attorney
W. Allen Cobb, District Attorney

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
COUNTY OF NEW HANOVER	SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA,	)
vs.	) A F F I D A V I T
LARRY DEAN PEARSON.	)

NOW COMES, Mr. Don Perdue, the Court Reporter for the State of North Carolina, who transcribed the testimony in the above entitled case and after first being duly sworn, deposes and says as follows:

1. That the testimony was lengthy in the case, and that due to a backlog of appeals I was unable to provide the Defense Attorney with a transcript of the trial until his original time for filing his Record on Appeal had expired.

This 9th day of October, 1975.

s/Donald R. Perdue (SEAL)
Don Perdue

Sworn to and subscribed before me,
this 9th day of October, 1975.

s/ Beverly Ervin
Notary Public

My commission expires: 1-20-80
(NOTARIAL SEAL)

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
COUNTY OF NEW HANOVER	SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA,	)
	)
VS.	) A F F I D A V I T
	)
LARRY DEAN PEARSON.	)

Now comes, Allen Cobb, District Attorney for the 5th Solicitorial District of the General Court of Justice of North Carolina being first duly sworn, deposes and says as follows:

1. That I prosecuted Larry Dean Pearson and that I was informed by this Attorney, Mr. John J. Burney, Jr., that due to the length of the testimony and the backlog of work for the Court Reporter, Mr. Don Perdue that the transcript would not be available in time for serving the Record on Appeal.

2. That in light of these circumstances (SIC) I agreed verbally with Mr. Pearson's Attorney, Mr. John J. Burney, Jr. that he could have an extension of time to file said Record on Appeal.

This 9th day of October, 1975.

Sworn to and subscribed before me,

this 9th day of October, 1975.

s/Beverly Ervin
Notary Public

My commission expires: 1-20-80

(NOTARIAL SEAL)